CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1938.

No. ~~[illegible]~~ 23-24

IN THE MATTER OF
LOS ANGELES LUMBER PRODUCTS COMPANY, LTD.,
a corporation,

DEBTOR.

THOMAS K. CASE AND ADELE B. COWAN, AND ESTATE OF ADELE B. COWAN, Deceased,

Petitioners,

vs.

LOS ANGELES LUMBER PRODUCTS COMPANY, LTD., a corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

THOMAS K. CASE,
1757 North Kingsley Drive, Los Angeles,
Appellant, in propria persona.

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ROBERT M. CLARKE,
THOMAS K. CASE,
Of Counsel.

Parker & Baird Company, Law Printers, Los Angeles.

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THOMAS K. CASE AND ADELE B. COWAN, AND ESTATE OF ADELE B. COWAN, Deceased,

Petitioners,

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LOS ANGELES LUMBER PRODUCTS COMPANY, LTD., a corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Honorable Charles Evans Hughes, Chief Justice of the Supreme Court of the United States, and to the Associate Justices of the Supreme Court of the United States:

Petitioners Thomas K. Case and the estate of Adele B. Cowan, deceased, pray that a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit, may issue to review the decree of that Court made upon the 12th day of January, 1939, in the above mentioned cause. Adele B. Cowan, then an appellant, died after that decree was made.

Statement of Proceedings in Court Below.

This cause arose under the provisions of Section 77B of the Bankruptcy Act (approved June 7th, 1934, 48 Stat. 912; 11 U. S. C. A., section 207, and hereinafter for convenience referred to as "Section 77B.") by the filing on January 28th, 1938, in the District Court of the United States for the Southern District of California, Central Division, of a petition by Los Angeles Lumber Products Company, Ltd., a California Corporation, Debtor, for leave to reorganize. From two decrees of that District Court confirming the Debtor Corporation's Amended Plan of Reorganization, the appellants appealed to the United States Circuit Court of Appeals for the Ninth Circuit. These appeals were consolidated by order of the Circuit Court. [R. 366.] The United States Circuit Court of Appeals for the Ninth Circuit, in a decision rendered January 12th, 1939, affirmed the decrees of the Court below approving the Amended Plan of Reorganization. [R. 372.]

Appellants on February 2nd, 1939, filed their petition for rehearing in the United States Circuit Court of Appeals for the Ninth Circuit. On February 9th, 1939, the latter Court denied appellants' petition for rehearing, and on the same date denied the petition of appellants for a Stay of Mandate. [R. 383.]

The Parties.

The parties in interest in this matter are the following: Los Angeles Lumber Products Company, Ltd., a California Corporation, hereinafter for convenience referred to as "the Debtor Corporation," was the petitioner in the District Court of the United States for the Southern District of California, for leave to reorganize under the provisions of section 77B of the Bankruptcy Act, and is the appellee in the Circuit Court.

The above named petitioners, Thomas K. Case and Adele B. Cowan, were the appellants in the United States Circuit Court of Appeals for the Ninth Circuit. They are dissenting bondholders owning $18,500 in face value of a first mortgage lien represented by a trust deed for the sum of $3,500,000 executed by Debtor Corporation and by its wholly owned subsidiary, the Los Angeles Shipbuilding and Dry Dock Corporation.

These two dissenting bondholders have not deposited their bonds and have never consented to any of the proceedings by Debtor Corporation, and as such bondholders were allowed to intervene in the reorganization proceedings in the District Court.

Recently appellant, Adele B. Cowan, passed away and the legal representatives of her estate have been substituted herein.

Summary Statement of the Matter Involved.

For several years prior to February 1st, 1929, the Debtor Corporation was engaged in the lumber business and later, through its subsidiary then in the shipbuilding business, constructed commercial vessels. They are not equipped to build warships and if a shipbuilding construc-

tion program is undertaken, it will require about $500,000 for necessary repairs. [R. 71.]

On February 1st, 1924, Debtor Corporation and Los Angeles Shipbuilding and Dry Dock Corporation by trust deed jointly executed by them, secured an authorized bond issue of $3,500,000. Los Angeles Lumber Products Company First Lien and Collateral Trust Twenty Year Seven and One-half Per Cent Sinking Fund Gold Bonds. Debtor corporation claims that there are outstanding of this bond issue, $2,565,500 face value, upon which no interest has been paid since February 1st, 1929. [R. 326.] These bonds are payable to bearer and by their terms would become due February 1st, 1944. To the amended plan of reorganization approved by the District Court, owners and holders of 92.81 per cent face value of Debtor Corporation's outstanding bonds, have consented to the plan. [R. 210.]

The case before the Circuit Court comprehends two appeals which were ordered consolidated by that court. [R. 366.] The first is the appeal from the "Interlocutory order" confirming the amended plan of reorganization and the second appeal is from the final order confirming the plan.

Debtor filed on January 28th, 1938, its petition in the District Court of the United States for the Southern District of California, Central Division, for leave to reorganize under the provisions of section 77B of the Bankruptcy Act and on that date that Court made its order finding that the petition had been filed in good faith.

The Shipbuilding & Dry Dock Corporation is a wholly owned subsidiary of the Los Angeles Lumber Products Company. [R. 66.]

The assets of Debtor Corporation are appraised herein at the sum of $830,203.23. [R. 80.]

This does not include the Los Angeles Harbor Leasehold interest which has been appraised at $1.00 and is carried on the books of the Debtor Corporation at no value. [R. 69.] This lease of valuable harbor frontage runs until 1952 and for it an annual rental is paid of $21,500. [R. 70.]

As shown by Debtor Corporation's petition for leave to reorganize, "the holders of debtor's bonds and debtor's stock are the only creditors and persons whose claims and interests will be affected by the plan" [R. 13, 16] and "all of the other creditors of debtor shall be paid the amount of their claims in full in cash and are thus not affected by the plan." [R. 13.]

The Los Angeles Lumber Products Company effected a reorganization in 1930 by which it became a limited liability corporation under state law and is the appellee in the proceedings before the Circuit Court.

Appellants in the Circuit Court of Appeals and petitioners herein for writ of certiorari are the only dissenting bondholders here, who have never deposited their bonds and have never consented to any of the past proceedings, either in 1930 or since then and have actively opposed the proceedings to reorganize under section 77B. [R. 108.]

Appellant Case has $13,500 face value bonds, and appellant Cowan, recently deceased, now represented by her estate, had $5,000 face value bonds, all of this first mortgage issue and all with interest coupons attached. Based upon these ownerships, the claims of petitioners herein were duly filed by them and were allowed and approved by the District Court. [R. 45, 151, 333.]

The Special Master's report was approved by the District Court, as shown by the Transcript of Record, with some minor exceptions which do not concern any of the bondholders. [R. 313.]

The amended plan of reorganization, which has been confirmed by the District Court and by the United States Circuit Court of Appeals for the Ninth Circuit, awards to bondholders 250 shares of the newly created preferred capital stock (par value of each share being $1.00) for each $1,000 bond, "the principal amount of the bonds" only. The plan also awards 188,625 shares of new common stock to Debtor's Class A shareholders who constitute the present stockholders of Debtor Corporation. [R. 58, 59, 342.]

Debtor is an insolvent corporation "both in the bankruptcy sense and in the equity sense." [R. 319.]

Although admittedly insolvent, twenty-three per cent of the new capital stock is awarded to the old stockholders. [R. 88, 92, 93.]

No allowance is made for the due and unpaid interest on the bonds, unpaid since February 1st, 1929 [R. 326], and which represents a sum now equal to the principal amount due on the bonds.

These bonds are to be "cremated" [R. 352, 353] and Debtor Corporation and its stockholders and unsecured creditors would receive, freed from the mortgage lien, all assets pledged in the trust deed. [R. 32, 331, 342, 343.]

The plan as approved is made "binding" upon appellants and petitioners herein, as secured creditors under the bond issue. [R. 151.]

Appellants contend that Debtor is estopped in this proceeding under the provision of that trust deed compre-

hending section 5, article 2, on page 29 of that instrument, as the same is set forth in *haec verba* in the Transcript of Record, pages 55, 56, 259.

Debtor contends that, notwithstanding the fact that petitioners herein, have never consented to any procedure, that they are bound by the consent to the plan, of bondholders owning more than 75 per cent of the outstanding bonds. [R. 261.]

All that petitioners herein, as dissenting bondholders, would receive for their bonds under the approved plan, would be shares of new capital stock representing a dollar for dollar face value of *one-eighth of the total amount due to them, as unpaid principal and interest* due and unpaid.

The transcript, consented to by all parties and printed and used in the Circuit Court, shows all of the foregoing facts.

The appeal to the United States Circuit Court of Appeals for the Ninth Circuit was based upon the transcript which contained the orders of the District Court and all necessary evidence as agreed upon and admitted for the purposes of that transcript, and upon the briefs. That transcript is complete for all purposes of the appeal which is based upon the questions of substantive law shown by the record to be involved herein. Appellants' stipulation not to attack the findings of facts of the trial court on the ground that they are unsupported by evidence, does not prevent them from raising the questions of law and standing upon the substantive law involved and as revealed by the District Court's confirmation of an unfair plan. This is a plan which destroys the substantive right to their first mortgage lien which exists in petitioners and where an

insolvent corporation secures 23 per cent of its new capital stock for present stockholders who have no equity therein.

The transcript is complete for the purposes of the appeal and it contains all necessary features to present the questions of substantive law which are involved herein. The stipulation not to attack the findings of facts of the trial court upon the evidence, itself contains the six grounds upon which the appeal is based. [R. 286, 287.] The sixth point therein "that appellants contend that as to them, said plan is neither fair, equitable nor feasible and is discriminatory", is supported not alone by the transcript but by the judgment roll alone. The six points set forth in that stipulation, involve questions of substantive law. [R. 286.] If, in the opinion of debtor corporation, there was not deemed sufficient evidence presented by the transcript, it had the undoubted right to require that more evidence be printed in the transcript. This it did not do. The partial statement of the evidence was the one settled by the District Court without objection from, and was done with the consent of, counsel for Debtor Corporation. That Court's order was made July 6th, 1938, as shown by the transcript of record. [R. 263.]

Petitioners do not consider that this appeal to the Circuit Court of Appeals depends upon the judgment roll alone. The "Stipulation Between Counsel Respecting Both Appeals", which was signed on August 11th, 1938, by all attorneys for Debtor Corporation and all attorneys for appellants, contains the following recitation, to-wit:

> "It is further stipulated and agreed that the record, *the transcript on appeal* and the briefs of appellants and of appellee in No. 8841, the appeal now pending in the United States Circuit Court of Appeals for the Ninth Circuit, may all apply to, be used in and

in all respects considered in both appeals herein and in this appeal, with the full intent and purpose that the record and *transcript on appeal* in No. 8841, together with the copy of final order herein, shall be and constitute the *only* record on appeal in number ....., *and that no further or additional transcript, statement of evidence* or record need be prepared, printed or filed herein and that the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit may consider both appeals together and upon said record *and transcript* now on file in number 8841 and upon the briefs filed therein and upon the hearing thereof by said Honorable Judges of said Circuit Court of Appeals." [R. 367.] (Italics ours.)

This stipulation was made by all counsel with the intent to persuade the United States Circuit Court of Appeals to consolidate these two appeals and it consents to that particular record described therein and which then existed before the United States Circuit Court of Appeals for the Ninth Circuit in the pending first appeal known as number 8841.

The order of the United States Circuit Court of Appeals, based upon the foregoing stipulation, and made by that Court upon the 15th day of August, 1938, in case No. 8951, concludes as follows, to-wit:

"It Is Further Ordered that pursuant to stipulalation of counsel for the respective parties that the above entitled appeal may be consolidated with the appeal in Case No. 8841 in this Court and that the cause may be consolidated for briefing purposes, and that no further or additional record, statement of evidence or record need be prepared, printed or filed herein, unless counsel so desire." [R. 366.]

These show clearly that the transcript and the record, then completed in No. 8841, was acceptable to all counsel for all parties and as such, was then accepted by the United States Circuit Court of Appeals for the Ninth Circuit.

In the transcript appears some of the evidence of Debtor Corporation as well as some evidence of appellants and with this both sides of the litigation were satisfied. The record clearly shows the questions of substantive law involved. All questions of law presented by the record on appeal are shown in the judgment roll, the transcript and in all briefs which treated the record as complete. In no sense is the transcript incomplete for the purpose of presenting the questions of law involved in the appeal.

If this judgment is allowed to stand, all insolvent corporations in the country, burdened by bond issues, can and many will use it as a precedent under 77B, to cancel their bonds, appropriate to themselves all assets pledged in their bonded debts, will ignore all interest due and unpaid on their bonds and will award to their present stockholders who have no equity therein, substantial portions of the new capital stock without any other consideration therefor and thus retain control over and disposition of the assets of the new corporation. That consummation would then obtain where present stockholders, as in this case, do not agree to advance any new money, even where in cases, as in this case at bar, new money is shown to be absolutely necessary. All of this could be achieved without the payment of any valuable consideration and upon a mere offer of shares of capital stock in a new corporation which would have little or no value. This could be done a second time with new bond issues secured by the *same*

assets. Such a corporation, having obtained cancellation of its bonds, could sell the released assets, having no new money with which to do business and abandon the corporation. Truly, indeed, would then result the huge loss to bondholders who had been forced to become only stockholders; bondholders who, like appellants, paid full face value and accrued interest for their bonds. In this case the transcript shows that *present stockholders* now owning nearly a million dollars in face value bonds, acquired them at 6½ cents on the dollar. [R. 254.]

In no way does the transcript or do the briefs attack the *findings of fact* made by the trial Court. Appellants believe that the *conclusions of law* of the trial Court, based upon those findings of fact, are erroneous, do not represent the law of the land and can find no justification under any of the provisions of Section 77B of the Bankruptcy Act. If that decision stands and the affirmation of the Circuit Court of Appeals for the Ninth Circuit is the law in reorganization proceedings under 77B, then a bond is not a bond, or a secured lien, or a mortgage. It represents only future shares of capital stock in a new corporation whose stock would have little or no value.

To thus relegate dissenting bondholders who bought a first mortgage lien, to the grossly inferior position of stockholders is abhorrent to the spirit of justice, to the principles of law long established and was never contemplated by the provisions of Section 77B.

The importance of this case greatly transcends any possible fate of these petitioners. It affects materially the many thousands of purchasers of bonds in existing and future private corporations.

Questions Involved and Reasons for Allowance of the Writ of Certiorari.

Under the decision of the District Court and affirmed by the Circuit Court, substantive property rights have been taken from dissenting bondholders without adequate compensation. The first mortgage lien of petitioners constitutes such a right. The Supreme Court of the United States has decided that

> "the right to retain the lien until the debt secured thereby is paid, is a substantive property right which may not be taken from the creditor consistently with the 5th and 14th Amendments to the Constitution."
>
> *Louisville Joint Stock Co. v. Radford,* 295 U. S. 555.

That involves the first point urged in this petition. Several decisions of the United States Circuit Courts of Appeals have quoted and adopted this doctrine.

In this case this private corporation's bond is a first mortgage lien. That bond is a bond and not to be destroyed by exchanging therefor a small number of shares of $1.00 par value each of new capital stock. This new corporation is dependent for its existence upon the acquisition by it, freed from the lien, of the assets which are pledged in the trust deed securing these bonds.

There is nothing in 77B of the Bankruptcy Act, or elsewhere, which authorizes a first mortgage lien to be cancelled and permits an insolvent corporation to appropriate all of the assets pledged in and securing that lien,

in sole consideration of the issuance of a small number of shares of capital stock in a new corporation and which is much smaller than the old corporation.

No plan of reorganization similar to this plan, or in any way half as unfair in its pretended attempt to compensate for bonds taken, exists so far as can be found. Not even in railroad or in public utility reorganizations, in all of which the public interest was involved, has there been confirmed a plan of reorganization which would cancel the bonds of a private corporation, appropriate all assets securing the bonds and for these, award only shares of capital stock in a new corporation which would thus be enabled to do business with those assets thus acquired.

The plan in this case also denies any compensation for all due and unpaid interest on the bonds—now equal in amount to the unpaid principal due on the bonds. There are several decisions of the United States Circuit Courts of Appeals which have decided that this cannot be done.

Under another point involved in this appeal, several decisions of United States Circuit Courts of Appeals have uniformly held that present stockholders of insolvent corporations have no equity therein and are not entitled to shares of new capital stock in reorganized corporations. When such a consummation is sought it is always for the purpose of perpetuating control of the new corporation in the hands of the old stockholders who have declined to meet the obligation of their bonded debts.

In practically all of the cases of corporations seeking permission to reorganize, there have been vast majorities of the bondholders who have "consented" to the plans. This has been due to the machinations of "Bondholders' Protective Committees" and those in privity with them, especially large stockholders. Their practices in securing the consents of bondholders, have attained the scope of a national scandal.

Debtor Corporation claims that petitioners herein are bound by the consent of the majority. There is nothing in 77B or in the general law which permits that consummation. On the contrary, there are cases decided by the Supreme Court and by several United States Circuit Courts of Appeals which hold the opposite view. These cases determine that dissenting bondholders, as a minority, are not bound by any majority, however large, and cannot be deprived of their legal rights by any contract to which they are not actually a party.

Under the circumstances disclosed by the transcript of record before this Court, there was not compensation provided for dissenting bondholders and the plan does not afford them the "adequate protection" required by Section 77B, subdivision (b)(5) of the Bankruptcy Act. The question of adequate protection within the meaning of the Act, does not seem, so far as we can find, to have directly reached the Supreme Court. Perhaps we are dependent for construction of that provision of the Act upon the several decisions of the United States Circuit Courts of Appeals. None of the Federal Courts seem to have had

before them any plan of tendering only shares of capital stock for the bonds, like the plan in this case. Always there was either: cash for the bonds, or half-cash for the old bonds and the remainder in new bonds, or mainly cash for the old bonds and shares of capital stock for a small unpaid balance—and then only when present stockholders tendered "new money" to enable the new corporation to do business. No new money is tendered in this plan and new money is found to be necessary in the orders of the District Court, a part of the judgment roll set forth in the transcript of record. The decisions quoted and cited in our brief to this petition show that there has not been proposed any plan like this one in the case at bar. The District Court had not the legal right to substitute its hope for the future success of a reorganized corporation, for any plan manifestly unfair. That the District Court thought, and the Circuit Court probably believed by affirming, that by permitting the reorganization in this case that bondholders might eventually be better off with only shares of new capital stock, by allowing the experienced and wealthy stockholders to continue the building of commercial ships, is opposed to the law governing this case. That view of the trial Court is designed to build up an equity in the old stockholders where they are not entitled to an equity and permits a gamble upon the corporation's being able to do business successfully in the future where it has failed in the past.

Petitioners believe that the transcript of record before this Court establishes the fact that this plan of reorgani-

zation, as to dissenting bondholders, is neither fair, equitable nor feasible (without the necessary new money) and is discriminatory in that it awards all of the mortgaged assets to present stockholders of Debtor Corporation, additional stockholders and to its general and unsecured creditors.

Petitioners urge that the lower Court should have decided the question of estoppel of debtor under a provision of debtor's own contract—the trust deed. This was specially pleaded in the trial Court and is based upon section 5, of article 2, on page 29 of the trust deed. This appears fully and in *haec verba* in the transcript of record before the Court, that being the exact transcript required by the amended praecipe which was consented to by all counsel in the case. [R. 288.]

That such plan of reorganization as was adopted in this case is unfair and inequitable, is shown by numerous decisions of the United States Circuit Courts of Appeals, from which appeals were not taken to the Supreme Court of the United States.

Presented herewith are questions of law which involve substantive rights and are furnished by the record in this case. The points of law presented in the briefs on appeal, by the judgment roll and the transcript, are those repeated in the brief accompanying this petition, with the citation of such authorities as we have been able to find and some of which are of very late dates.

Wherefore, your petitioners respectfully pray that a Writ of Certiorari be issued under the seal of this Court directed to the United States Circuit Court of Appeals for the Ninth Circuit, to the end that this cause may be reviewed and determined by this Court and that the judgment of the Circuit Court of Appeals and of the District Court of the United States for the Southern District of California may be reversed, and that your petitioners, Thomas K. Case and the estate of Adele B. Cowan, deceased, may have such other and further relief as this Court may deem proper in the premises.

Dated Los Angeles, California,

March 23rd, 1939.

Respectfully submitted,

THOMAS K. CASE,

Petitioner and Appellant in Propria Persona,

CLARKE & BOWKER,

By ROBERT M. CLARKE,

Attorneys for Adele B. Cowan, Appellant and Petitioner, and the Estate of Adele B. Cowan, Deceased.

STATE OF CALIFORNIA,
COUNTY OF LOS ANGELES. } ss.

Robert M. Clarke, being first duly sworn, deposes and says: that he is a member of the bar of the Supreme Court of the United States and is an attorney for the estate of Adele B. Cowan, deceased, who was known herein as Adele B. Cowan who was an appellant in the proceedings before the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled matter; that he makes this verification on behalf of Thomas K. Case and Adele B. Cowan, appellants, and the Estate of Adele B. Cowan, Deceased, as petitioners herein; that affiant has read the foregoing petition, was the attorney for said appellant Adele B. Cowan, and has knowledge of this litigation; that the matters stated in said petition are true to the best of his knowledge, information and belief; that the foregoing petition is well founded and entitled to the favorable consideration of this Court and that it is not interposed for the purpose of delay.

ROBERT M. CLARKE.

Subscribed and sworn to before me this 23rd day of March, 1939.

[Seal] C. STEPHENS

Notary Public in and for the County of Los Angeles, State of California.

My commission expires Jan. 26, 1942.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1938.

No. .....

IN THE MATTER OF

LOS ANGELES LUMBER PRODUCTS COMPANY, LTD., a corporation,

DEBTOR.

THOMAS K. CASE AND ADELE B. COWAN, AND ESTATE OF ADELE B. COWAN, Deceased,

Petitioners,

vs.

LOS ANGELES LUMBER PRODUCTS COMPANY, LTD., a corporation,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinions of the Courts Below.

The decision, judgment and decree of the District Court of the United States, for the Southern District of California, Central Division, in proceedings for reorganization,

No. 31,352 RJ. and confirming Debtor Corporation's plan of reorganization, is reported in 24 Fed. Suppl. 501.

The opinion of the United States Circuit Court of Appeals for the Ninth Circuit [R. pp. 372-380] is reported in 100 Fed. (2d) 963.

The United States Circuit Court of Appeals did not render an opinion upon denial of the Petition for Rehearing filed in this cause.

The Final Order Confirming Plan of Reorganization, made by the District Court, appears in the Transcript of Record furnished to this Court, on pages 306-364;

The Interlocutory Order Confirming Plan of Reorganization, made by the District Court, appears in the Transcript of Record furnished to this Court, on pages 129-155.

II.

Jurisdiction.

The Supreme Court is asked to exercise its jurisdiction under Section 240(a) of the Judicial Code (28 U. S. C. A., 347; 43 Stat. 938). *Stoll v. Gottlieb,* decided Nov. 21st, 1938 Advance Opinions 1938-1939, Vol. 83, p. 116, 59 Sup. Ct. 134, and under *In re 620 Church St. Bldg. Corporation,* 299 U. S. 24, 27; 57 Sup. Ct. 88, 89, 81 L. Ed. 16.

Judgment of the Circuit Court of Appeals affirming the judgment of the District Court, was entered January 12th, 1939, [R. 372, 380] and the opinion of the Circuit Court of Appeals, by minute order, denying the Petition for Rehearing filed by your petitioners, was made February 9th, 1939. [R. 383.]

III.

Statement of the Case.

A summary statement of the matter involved in this case is made in the Petition for Writ of Certiorari and for that reason is not repeated here.

IV.

Specification of Errors.

1. The Circuit Court of Appeals for the Ninth Circuit erred in concluding under the circumstances disclosed in this case, that petitioners, as dissenting bondholders, should be deprived of and lose their first mortgage lien, their right to foreclose and other substantive rights; [R. 274, 302.]

2. That the Court erred in concluding under the circumstances disclosed in this case, that present stockholders of an insolvent corporation in which they have no equity, could participate in the plan of reorganization, either to the extent of 23 per cent or any other percentage; [R. 275, 303.]

3. That the Court erred under the circumstances disclosed in this case, in sustaining a plan that is not fair because no compensation is provided for dissenting bondholders for the loss of their mortgage lien, and a plan which does not afford them the "adequate protection" required by section 77B, subdivision (b) (5) of the Bankruptcy Act; [R. 275, 303.]

4. That the Court erred in depriving of their substantive rights, these petitioners as dissenting bondholders, as a minority who are not bound by any majority of consenting bondholders, however large, and that appel-

lants cannot be deprived of their rights as "non-assenting creditors" by any kind of a contract to which they are not actually a party, even though more than 75 per cent have consented to the proposed plan; [R. 276, 303, 304.]

5. That the Court erred in depriving petitioners of the interest promised in the bonds, also represented by coupons attached to the bonds and an integral part of those bonds and for which no compensation or consideration of any kind has been allowed or extended to dissenting bondholders; [R. 277, 304.]

6. That the Circuit Court erred in sustaining a plan which as to dissenting bondholders is neither fair, equitable nor feasible (in that no necessary new money is offered) and is discriminatory in that it discriminates unfairly in favor of unsecured creditors and present and future stockholders of Debtor Corporation and against the rights of petitioners as dissenting bondholders; [R. 278, 304.]

7. That the Court erred in not deciding the doctrine of estoppel of debtor corporation which was specially pleaded and in which connection petitioners rely upon section 5 of article 2, page 29 of the trust indenture and which appears fully and in *haec verba*, in the transcript before the Court, which transcript was required by the amended praecipe and which transcript and praecipe were consented to by all counsel in this case; [R. 268, 55, 56, 259.]

8. That the Circuit Court erred in deciding that the judgment and decree of the District Court of the United States confirming debtor corporation's plan of reorganization, should be affirmed.

AUTHORITIES AND ARGUMENT.

I.

The Court Erred in Concluding Under the Circumstances Disclosed in This Case, That Petitioners, as Dissenting Bondholders, Should Be Deprived of and Lose Their First Mortgage Lien, Their Right to Foreclose and Other Substantive Rights.

This Plan Takes Away From Petitioners Their Vested Rights in the Properties Mortgaged by Debtor to Secure Payment of the Bonds, Without Payment in Full, Without Payment of Any Due and Unpaid Interest on the Bonds and, Only for "the Principal Amount of the Bonds", Offers Preferred Stock in a New Corporation on an Unfair and Inadequate Basis. Debtor Would Retain, Freed From the Mortgage Lien, All of the Pledged Assets for the Benefit of Debtor's Unsecured Creditors and Its Stockholders.

> "All bonds and appurtenant coupons of debtor shall be surrendered to Security-First National Bank of Los Angeles, as one of the trustees under the trust indenture securing such bonds and such trustee is hereby directed to cancel such bonds and coupons and to cremate the same on the final consummation of the plan." [R. (a) 352, 353.]

The Supreme Court of the United States in *Louisville Joint Stock Co. v. Radford*, 295 U. S. 555, said:

> "The right to retain the lien until the debt secured thereby is paid, is a substantive property right which may not be taken from the creditor consistently with the 5th and 14th Amendments to the Constitution."

There the Supreme Court, on pages 589 *et seq.*, added:

> "Fourth. The Bankruptcy power, like the other great substantive powers of Congress, is subject to the 5th Amendment."

That Supreme Court case was cited and this doctrine followed by the United States Circuit Court of Appeals for the Ninth Circuit, in *Security-First Nat'l Bank v. Rindge Land Co.*, 85 Fed. (2d) 557, where, on page 561, in subdivision 3 of that decision, the Court said:

> "There is nothing in Section 77B which authorizes a debtor to pay a secured creditor less than half of the amount of the debt, while retaining to his own use a portion of the property securing the debt."

and also on that same page:

> "The right to retain a lien until the debt secured thereby is paid, is a substantive property right which may not be taken from the creditor consistently with the 5th and 14th Amendments to the Constitution. (Louisville Joint Stock Co. v. Radford, 295 U. S. 555.)"

and also in subdivision 5 of that Ninth Circuit Court decision, appears the following:

> "Section 77B, subd. (A), 11 U. S. C. A., section 207, gives the Court equity powers but it does not purport to alter long established incidents of property by introducing a vague and indefinable 'equity' into the proceedings. (*In re* Judith Gap Co. v. Commercial Co., C. C. A. 8, 5 Fed. (2) 307. (Certiorari denied by U. S. Supreme Court Jan. 4th, 1937.))"

The record in this case shows that all that is offered to dissenting bondholders are shares of the capital stock of the new corporation to be organized, "for

the principal amount of the bonds" and nothing is allowed for the unpaid interest on the bonds and which alone, is now equal to the principal amount now due on the bonds.

No case is cited by appellee, and we believe none exists, where nothing but capital stock of a new or reorganized company is offered to dissenting bondholders.

In the late case deciding this question, of *In re Day and Meyer, Murray and Young,* 93 Fed. (2d) 657, rendered January 3rd, 1938, by the Second Circuit Court of Appeals (N. Y.), it was determined:

> "A reorganization plan providing that first mortgage bonds be reduced to one-half of their principal amount and that the equity thereby created be represented by issuance of new preferred and common stock, to be shared by bondholders with general creditors, present preferred stockholders and management, and eliminating the total amount of interest past due on the bonds, was unfair and should not have been confirmed * * * since the plan did not preserve priorities and deprived bondholders of their lien.
>
> *"Such a plan does not preserve priorities. See Northern Pacific Co. v. Boyd,* 228 U. S. 482."

The opinion of the Ninth Circuit Court of Appeals ignores this important question of substantive law which has been repeatedly affirmed by it and opposes its prior decisions as herein quoted.

Among other cases holding that a plan of reorganization which takes from the bondholders the mortgaged property of the debtor corporation and appropriates it unconditionally to the debtor and its unsecured creditors without

payment to dissenting bondholders and violates the 5th and 14th Amendments to the U. S. Constitution, are:

Continental Ills. Nat'l Bank v. Chicago Rock Isl., 294 U. S. 648;

Northern Pacific Co. v. Boyd, 228 U. S. 482, that priorities are not preserved;

In re Tennessee Publishing Co., 299 U. S. 18, in which a statute of Tennessee was construed.

The California statute, section 726, Code of Civil Procedure, is much stronger than the statutes of either Tennessee or Kentucky. In 6A *California Jurisprudence*, section 800, on page 1371, it is asserted:

> "Upon a reorganization, the bondholders have the right, without regard to any of the equities of the stockholders or creditors of the Company, to foreclose their lien and bid in the properties."

Note 14 cites *Ginty v. Ocean Shore Railroad Co.*, 172 Cal. 31.

Section 800 of 6A *Cal. Jur.* is headed "Reorganizations by Bondholders—such as Railroads." Undoubtedly in considering reorganizations by "railroads" and public utility corporations, the courts might look more favorably upon them, solely because of the "public interest" in them. That is expressly enunciated in the proposed reorganizations of railroads and public utilities.

Section 726, *C. C. P.*, commences:

> "There can be but one form of action for the recovery of any debt or the enforcement of any right secured by mortgage upon real or personal property, which action must be in accordance with the provisions of this chapter.", etc. Then it provides for the sale of such property.

II.

The Court Erred in Concluding Under the Circumstances Disclosed in This Case, That Present Stockholders of an Insolvent Corporation, in Which They Have No Equity, Could Participate in the Plan of Reorganization, Either to the Extent of 23 Per Cent or Any Other Percentage.

We fail to find where the opinion of the Court of Appeals decides this question. It has been frequently held that where a corporation is insolvent there is no equity for present stockholders. The findings of the trial court show that this corporation is insolvent and that they may participate to the extent of 23 per cent of the capital stock of the new corporation. [R. 88, 90.]

The Supreme Court in *In re 620 Church Street Building Corporation*, 299 U. S. 24, 27, 57 S. Ct. 88, 89, 81 L. Ed. 16, was of the opinion that

> Unless the property of the debtor exceeded in value the amount of the claims of creditors, the stockholders had no interest to protect or preserve.

The following cases all hold that where a corporation is insolvent, there is no equity to entitle the present stockholders to participate in the stock of the new company:

In re Day and Meyer, Murray & Young (2d Cir.), 93 Fed. (2d) 657;

In re Barclay Park Corporation (2d Cir.), 90 Fed. (2d) 595;

Reading Hotel Corp. v. Prot. Com., 89 Fed. (2d) on page 53;

O'Connor v. Mills (8th Cir.), 90 Fed. (2d) 665, 667;

Brunkenfeld v. N. Y. Railways, 82 Fed. (2d) 740 and 744;

Wayne Un. Glass v. Owens Ills. Glass Co., 91 Fed. (2d) on page 832;

Price v. Spokane Silver & Lead Co., 97 Fed. (2d) 237.

In a very recent case, *In re Vicksburg Bridge Co.*, 22 Fed. Supp. 490, in the issue of April 18th, 1938, on page 507, the concluding words of that decision are:

> "The conclusion is inescapable, therefore, that the debtor is insolvent and there would be no equity for stockholders which would entitle them to participate in the reorganization."

This is the second case in 1938 which so holds—the other being *In re Day and Meyer, supra.*

The third case decided in the year 1938, the very recent one, decided August 24th, 1938, 8th Circuit, that of *Sophian, et al. v. Congress Realty Co.*, 98 Fed. (2d) 499, that Court held:

> "(2) Section 77B cannot be used to aid stockholders at the expense of bondholders or other creditors, or for the purpose of continuing in business a corporation hopelessly insolvent and unable to prosecute its business with any reasonable prospect of success. Brockett v. Winkle Terra Cotta Co., 8 Cir., 81 Fed. (2) 949, 953; First Nat'l Bank v. Conway Road Estates Co., 8 Cir., 94 Fed. (2) 736, 839; Price v. Spokane Silver & Lead Co., 8 Cir., 97 Fed. (2) 237, 245, 246; and also
>
> "(3) Stockholders may not better their position at the cost of bondholders or other creditors; and to justify a retention of stock interest by stockholders

of a debtor it must appear that they have furnished some compensatory additional consideration or have an equity in the estate of the debtor after the rights of creditors are fully provided for. See *In re* Barclay Park Corpn., 2 Cir., 90 Fed. (2) 595, 597, 598; *In re* Day and Meyer, Murray and Young, Inc., 2 Cir., 93 Fed. (2) 657; O'Connor v. Mills, 8 Cir., 90 Fed. (2) 665, 666, 667; Reading Hotel Corp. v. Protective Committee, 3 Cir., 89 Fed. (2) 53; Wayne United Glass Co. v. Owens-Illinois Glass Co., 4 Cir., 91 Fed. (2) 827, 832; Price v. Spokane Silver & Lead Co., *supra,* at page 245; and also

"(4) It is the duty of the Court of Bankruptcy to carefully scrutinize plans of reorganization proposed for insolvent companies to make certain that the assets belonging to creditors are not, by indirection, diverted to stockholders. *In re* N. Y. Railways Corp., 2 Cir., 82 Fed. (2) 739, 744; *In re* Day and Meyer, Murray & Young, Inc., *supra,* at page 659; Price v. Spokane Silver & Lead Co., *supra,* at page 245."

The fourth case decided in the year 1938, on June 13th of that year, 8th Circuit, that of *Price v. Spokane Silver & Lead Co.,* 97 Fed. (2d) 237, on page 245, it is said:

"(8-10) The Court also erred in confirming the plan of reorganization, which made no distinction between creditors and stockholders, and placed them on a substantial parity. Unless the property of the debtor exceeded in value the amount of the claims of creditors, the stockholders had no interest to protect and preserve. *In re* 620 Church Street Building Corporation, 299 U. S. 24, 27, 57 S. Ct. 88, 89, 80 L. Ed. 16. We find nothing in the evidence, except generalizations and prophesies, to warrant any conclusion that the value of the assets of the debtor even

equalled its liabilities, excluding its stock liability. To justify a retention of a stock interest by present stockholders of the debtor, it should appear that they have furnished an additional consideration, or have an equity in the estate of the debtor after the rights of creditors are fully provided for. *In re* Barclay Park Corporation, 2 Cir., 90 Fed. (2) 595. See, also, *In re* Day & Meyer, Murray & Young, Inc., 2 Cir., 93 Fed. (2) 657; O'Connor v. Mills, 8 Cir., 90 Fed. (2) 665, 667; Reading Hotel Corporation v. Protective Com., 3 Cir., 89 Fed. (2) 53; Wayne Un. Glass Co. v. Owens Ills. Glass Co., 4 Cir., 91 Fed. (2) 827. Stockholders are not ordinarily entitled to participate in a plan of reorganization if the debtor is clearly insolvent."

"It is the duty of the Court to scrutinize the plans of reorganization proposed for insolvent companies to make certain that the assets belonging to creditors are not by indirection diverted to stockholders."

Price v. Spokane Silver & Lead Co. (8 Cir.), 97 Fed. (2d) 237, 245;

In re N. Y. Railways Corpn. (2 Cir.), 82 Fed. (2d) 739;

In re Day & Meyer, Murray & Young (2 Cir.), 93 Fed. (2d) 657, 659;

In re Barclay Park Corpn., (2 Cir.), 90 Fed. (2d) 595;

Brunkenfeld v. N. Y. Rys. Corpn., 82 Fed. (2d) 740, 744.

Debtor corporation is insolvent. Its outstanding bonds represent a face value of $2,565,500. With due and unpaid interest on those bonds, the obligation under the trust indenture is about five million dollars.

"Its assets, subject to the bond issue, have been appraised at $465,000. The other assets of the Shipbuilding Company (its subsidiary) including cash, accounts receivable, etc., were appraised herein at $365,203.23. These last mentioned assets were not directly subject to the lien of the trust indenture securing debtor's bonds." [R. 206.]

Clearly it is thus one of "the corporate cripples."

In *Price v. Spokane Silver & Lead Co., supra,* that Court held:

"(15) We think it may be safely said that it was not the intention of Congress in enacting section 77B to place crutches under corporate cripples, fit subjects for liquidation, and send them out into the business world to be a menace to all who might purchase their securities or deal with them on credit."

In the case of *In re Day and Meyer, Murray & Young,* 93 Fed. (2d) 657 (2d Cir.), that Court said:

"It is the duty of the Court to scrutinize the plans of reorganization proposed for insolvent companies to make certain that the assets belonging to creditors are not, by indirection, diverted to stockholders. *In re* N. Y. Rys. Corpn., 2nd Circuit, 82 Fed (2) 739; *In re* Barclay Park Corpn., *supra.*"

In *Wayne United Glass Co. v. Owens Ills. Glass Co.,* 91 Fed. (2d) 827, decided August 6th, 1937, it was held on page 832:

"Where debtor is insolvent, stockholders consent to confirmation of plan is unnecessary, and the same is true of junior incumbrancers, who have no equity to be protected."

In *Reading Hotel Corpn. v. Protective Com.*, 89 Fed. (2d) on page 53, decided March 17th, 1937, that Court held:

> "Where property of a hotel corporation was subject to first and second mortgage * * * the Court properly approved reorganization plan whereby the corporation's property was transferred to bondholders, it being evident that stockholders had no equity, etc."

In *Brunkenfeld v. N. Y. Rys. Corp.*, 82 Fed. (2d), on pages 740 and 744, it was held:

> "8. Courts will scrutinize with care all plans of reorganization proposed for insolvent corporations, to make certain that assets belonging to creditors are not, by indirection, diverted to stockholders. Bankr. Act 77B. (b) (4)."

and

> "9. Stock equity in insolvent corporations may not be allowed to participate in any plan of reorganization which does not first provide for making creditors whole. Bankr. Act 77B (b) (4)."

In *Gerdes on Corporate Reorganization*, page 1740, is the following:

> "If the debtor is insolvent, no class of stockholders has an equity in the property of the debtor and no provision need be made for them in the plan." Citing
>
> *Reading Hotel Corpn. v. Protective Com.*, 89 Fed. (2d) 53; and
>
> 11 Fed. Suppl. 594. under 77B.

III.

That the Circuit Court Erred Under the Circumstances Disclosed in This Case, in Sustaining a Plan That Is Not Fair Because No Compensation Is Provided for Dissenting Bondholders for the Loss of Their Mortgage Lien, and a Plan Which Does Not Afford Them the "Adequate Protection" Required by Section 77B, Subdivision (b)(5) of the Bankruptcy Act.

The first portion of this point that the plan is not fair because no compensation is provided for dissenting bondholders for the loss of their mortgage lien, seems to have escaped construction or determination in the opinion of that Court. The Circuit Court does decide that there is "adequate protection" as contemplated in subdivision (b)(5) of 77B of the Bankruptcy Act.

As to "adequate protection" for dissenting bondholders, the Bankruptcy Act indicates "(1) the payment in cash." 77B (5) clause (5). Another provision of the Bankruptcy Act, *that of Section 57, clause (h),* is as follows:

> "The value of securities held by secured creditors shall be determined by converting the same into money according to the terms of the agreement pursuant to which such securities were delivered to such creditors."

In *First National Bank v. Florshem,* 290 U. S. 504, at pages 519-521, the Supreme Court held:

> "The minority were entitled to payment in full."

(The minority were the petitioners in that case.)

Not even "a fraction of the face value of their holdings" is given to dissenting bondholders. It is the policy of the law, in instances of corporate reorganizations under 77B, to sustain UNIMPAIRED, that mortgage lien of dissenting bondholders.

In *Security-First Nat'l Bank v. Rindge* (9 Cir.), 85 Fed. (2d) 557, the Ninth Circuit Court of Appeals quotes a portion of subdivision (b), clause (5), and commenting upon it, decides, on page 561:

> "The legal value or property right in an obligation is the right to recover from the maker to the entire extent of his promise to pay. (Citing authorities.)
>
> "Manifestly, therefore, a plan of reorganization which gives bondholders only 40 per cent of the face value of their holdings does not make 'provision for the payment of their claims in cash in full.'
>
> "It is equally well settled that a plan of reorganization does not 'provide adequate protection' to creditors, within meaning of subdivision (b), clause (5), when it gives such creditors only a fraction of the face value of their holdings. In a recent proceeding under 77B, which came before this Court, the contention was urged that certain bondholders received 'adequate protection' by acquiring bonds of about half the face value of their former holdings. In rejecting the argument, this Court held that the protection for creditors specified in the Act must be 'completely compensatory.' Francisco Bldg. Corp. v. Battson, 9 Circ., 83 Fed. (2) 93. A like conclusion was announced by the 6th Circuit in *In re* Tennessee Pub. Co., *supra*.

"There is nothing in section 77B which authorizes a debtor to pay a secured creditor less than half the amount of the debt while retaining to its own use a portion of the property securing the debt. The right to retain a lien until the debt thereby secured is paid, is a substantive property right which may not be taken from the creditor consistently with the 5th and 14th Amendments to the Constitution. Louisville J. S. Co. v. Radford, 295 U. S. 555."

In *Horn v. Ross Island* (9 Cir.), 88 Fed. (2d) 64, the Ninth Circuit Court quotes in full, the paragraph above mentioned, of its decision in the *Rindge* case (85 Fed. (2d) on p. 561) and the notes that "Certiorari denied by U. S. Supreme Court, January 4th, 1937."

The Supreme Court of the United States, in 299 U. S. 18, affirmed, after having granted certiorari, the following doctrine announced in *In re Tennessee Publishing Co. v. American National Bank*, 81 Fed. (2d) 463:

"We confine ourselves to the provisions of subsection (b) (5) which outline a method for adjustment of claims of non-assenting creditors * * *.

"The right to have the mortgaged property devoted primarily to the satisfaction of the debt and the right to control the property meanwhile during the period of default, etc. These are substantive property rights and *any* invasion of them under the authority of the present statute, is as clearly violative of the due process clause of the 5th Amendment, as it was in the Radford case, 295 U. S. 555."

In *Texas Hotel Corporation v. Waco Development Co.*, 87 Fed. (2d) on page 400, that Court quoted and quite fully considered "paragraph (b)(5)" requiring "adequate protection" to secured creditors "for the realization by them of the value of their interests, claims or liens"; and there decided:

> "The Judge is not given the power, if it could be done, to substitute his judgment for the acceptance of a CLASS OF MORTGAGE CREDITORS. The words 'such protection', refer back to the words 'adequate protection for the realization by them of the value of their interests, claims or lien.'
>
> "Realization implies that what was *in prospect*, has COME TO HAND. Payment of the face of the claim IN CASH is the perfect realization of a money chose in action. But realization of the value of a claim or interest, may be adequately secured BY A SALE OR APPRAISAL OF THE THING which gives it value with the proportionate part of the value paid, or else the thing may be segregated and divided out *in kind*, or else LEFT UNAFFECTED for the holder of the claim to proceed according to his unchanged contract. Such are the instances specifically mentioned *as adequate* in subparagraphs (a), (b) and (c), paragraph (b) (5) of Section 77B."

Also:

> "Any plan confirmed under this clause without the consent of any class of claimants, must adequately provide for the realization by such claimants of the value of their claim."

IV.

That the Court Erred in Depriving of Their Substantive Rights, These Dissenting Bondholders, as a Minority Who Are Not Bound by Any Majority of Consenting Bondholders, However Large, and That Appellants Cannot Be Deprived of Their Rights as "Non-Assenting Creditors," by Any Kind of a Contract to Which They Are Not Actually a Party, Even Though More Than 75 Per Cent Have Consented to the Proposed Plan.

The opinion of the appellate court seems to have ignored this point and the decisions cited and from which quotations are furnished in appellants' opening brief (pages 25-33), are not referred to or construed in the opinion. This question of majority control (of a minority) is decided in those cases, in favor of the position occupied by appellants in this case.

The negative provision as a portion of subdivision (b) (5) "where less than two-thirds in amount of a given class have accepted the plan," is not involved in this case.

That is the opinion of appellee. In its reply brief, at the bottom of page 25, appellee asserts:

> "Here it is not necessary to apply the provisions of subdivision (b) (5) of section 77B of the Bankruptcy Act because more than two-thirds of the bondholders as a class have approved the plan."

In *First National Bank v. Florshem,* 290 U. S. 504, "95 per cent of all outstanding debentures were deposited under the plan" and that Court held that even such a majority

could not dominate the small minority or deprive it of its lien, denominated "a substantive right" and that "petitioners (the minority) were entitled to payment in full" (pp. 519-521).

This Supreme Court decision has been frequently cited in decisions by U. S. Circuit Courts of Appeals supporting the doctrine that

> "Even if a large majority of the creditors had approved the plan, that would be of no avail to sustain it."

The Supreme Court of the United States, in a comprehensive decision, in *Northern Pacific Ry. Co. v. Boyd*, 228 U. S. 482, on pages 502 and 503, said:

> "Contracts for reorganization made between bondholders and stockholders of corporations, insolvent or financially embarrassed, involving the transfer of corporate property to a new corporation, while proper and binding as between the parties, cannot, even when made in good faith, *defeat the claims of non-assenting creditors;* nor is there any difference whether the reorganization be made by *contract* or at a private sale, or consummated by a Master's Deed under a consent decree.
>
> "Even in the absence of fraud, *any* device whether by private contract or under judicial sale whereby stockholders are preferred to creditors, is invalid. 177 U. S. 683." (Italics ours.)

In another Supreme Court case, that of *Gilfillan v. Union Canal Co.*, 109 U. S. 401, is the following:

> "No majority, however large, can compel a minority, small though it be, to enter into such an agreement against their will, and, under the Constitution of the

United States it is probable that no statute of a state, passed after the bonds were issued, subjecting the minority to the provisions of the agreement, without their consent, would be valid."

The *Gilfillan* case was cited later as authority, in *Laura v. Barker,* 299 U. S. 521-522 and in 75 Fed. (2d) 261.

In that late case of *In re Day and Meyer, Murray and Young, Inc.,* decided in January, 1938 (93 Fed. (2d) 657), the Second Circuit Court of Appeals decided:

"That a large majority of bondholders approved an unfair plan of reorganization, was of no avail to sustain the plan."

The Ninth Circuit Court of Appeals, in *Horn v. Ross Island,* 88 Fed. (2d) 64, where there was only one bondholder, said:

"Dissenting bondholder is not bound by reorganization plan releasing debtor's property from lien of bonds where bondholders are to receive only the proceeds of part of mortgaged property even though such plan be approved by bondholders as a class."

Also:

"A corporate reorganization plan whereby bondholders were to be paid the proceeds of part of the property subject to trust deed and were to release the remainder subject to trust deed, to debtor and to debtor's general creditors, could not be approved so as to deprive objecting bondholder of his lien on any of the property subject to trust deed, although 75½ per cent of the bondholders approved the plan. Bankruptcy Act 77B; Constitutional Amendments 5 and 14, 11 U. S. C. A. 207."

In the latest case on this subject (Oct., 1938), that of *Sophian v. Congress Realty Co.*, 98 Fed. (2d) 499, on page 502, the 8th Circuit Court held:

> "(5) Even if a large majority of the creditors have approved a plan, that is of no avail to sustain it, if it is unfair, discriminatory, inequitable or not feasible. *In re* Barclay Park Corpn., *supra*, 90 Fed. (2) 595; First National Bank v. Florshem, 290 U. S. 504, 517-519, 54 S. Ct. 298, 303, 304, 78 L. Ed. 465, 90 A. L. R. 391; *In re* Day and Meyer, Murray & Young, Inc., *supra*, at page 659; Price v. Spokane Silver and Lead Co., *supra*, at page 245.
>
> "(6) In many reorganization proceedings such as this, the rights of small, scattered and thoroughly discouraged bondholders are involved. Often they are unable to employ counsel to protect their rights. It is of great importance that the courts of bankruptcy shall see to it that they are not unfairly dealt with."

Another late case (June 13th, 1938), that of *Price v. Spokane Silver & Lead Co.* (8 Cir.), 97 Fed. (2d) 237, on page 245; held:

> "Even if a large majority of the creditors had approved the plan, that would be of no avail to sustain it. First National Bank v. Florshem, 290 U. S. 504, 54 S. Ct. 298, 78 L. Ed. 465, 90 A. L. R. 391; *In re* Barclay Park Corporation, *supra*."

In the Ninth Circuit Court case of *Security-First Nat. Bank v. Rindge* (85 Fed. (2d) 577), the "bondholders committee * * * acquired more than 90 per cent of the outstanding bonds."

In *Texas Hotel Corpn. v. Waco Dev. Co.*, 87 Fed. (2d), on page 400, that Court decided:

> "The decree under review is finally rested upon this provision. We do not construe it to authorize the Judge to approve any plan which he thinks fair and equitable. If this were intended the statute could have been made much simpler and shorter. In this case, he thought it fair and equitable to reduce the interest, even retroactively, and to extend for seven years or more, the maturity of this mortgage debt, but if there had been a single, unwilling mortgagee, that plan could not have been constitutionally imposed. Louisville Joint Stock Bank v. Radford, 295 U. S. 555."

In 28 *Am. Law Reports*, on page 1197, is the following:

> "A majority of the bondholders of a company *cannot*, upon its reorganization, *compel a minority* to accept securities of the new company, is supported by the dictum of the court in Canada Southern R. R. Co. v. Gebhard, 109 U. S. 527, and
>
> "No majority, however large, can compel a minority, small though it be, to enter into such an agreement against their will and under the Constitution of the United States it is probable that no statute of a state, passed after the bonds were issued, subjecting the minority to the provisions of the agreement, without their consent, would be valid."

In any cases where reorganization was permitted subjecting a minority to the will of the majority, it is apparent that in every instance they were RAILROAD CASES or possibly a Public Utility Company. And in such cases, the controlling factor was always "the public interest." THIS DEBTOR IS A PURELY PRIVATE CORPORATION, operating for private profit and in no way is "the public interest" involved. [R. 328.]

In such public utility reorganizations, the rule is stated as follows:

> "Bondholders, especially of public service corporations such as railroad companies, may be regarded as having contracted with reference to the public interest, which may best be served by continued operation of the utility through a reorganization scheme, and the court might take the view that an exchange of securities required by a plan of reorganization to which the majority of the bondholders assented, did not, under these circumstances, violate the contract of the non-assenting bondholders. Especially might this be true where the exchange of securities of the old company, was for bonds of substantially the same character and value of the new or reorganized Company. But the case would be much weaker if the form of the claim were changed so that a bondholder in the old company was required to surrender his securities in exchange for stock in the new Company even though he retained the same relative rights of rank", etc. 28 Am. Law Reports (anno.), page 1196.

> "The bankruptcy power is subject to the 5th Amendment (to the Constitution) and that under the bankruptcy power, Congress cannot authorize the Bankruptcy Court to take for the benefit of the debtor rights in specific property acquired by the creditor."

(This quotation is taken from the case of *Horn v. Ross Island*, 88 Fed. (2d) 64, on page 65 of that decision, and is from the *Radford* case.)

In the *Horn* case *(supra) syllabi:*

> "A dissenting bondholder is not bound by such a plan even though it be approved by more than two-thirds of the bondholders as a class. See Collier Supp. 77B., Am. B. R. Digest section 1279." See page 66 of the decision.

In *First Nat'l v. Florshem,* 290 U. S. 504, there was "95 per cent of all outstanding debentures" and they could not deprive the small minority of its lien. Pages 519-521.

In the recent case of *In re Day & Meyer, Murray & Young,* 93 Fed. (2d) 657, there was 95 per cent consenting, yet there held:

> "That a large majority of bondholders approved an unfair plan of reorganization, *was of no avail to sustain the plan.*"

In the *Horn* case *(supra)* there was "75½ per cent" who could not "deprive objecting bondholder of his lien on any of the property subject to the trust."

In *Security-First Nat'l v. Rindge L. Co. (supra)* there was more than 90 per cent of outstanding bonds.

In the case of *Texas Hotel Corpn. v. Waco Develpt. Co.,* 87 Fed. (2d) on page 400, in addition to deciding that the "judge" cannot approve "*any* plan which he thinks fair and equitable." And "if this were intended, the statute could have been made much simpler and shorter," and also holds:

> "But if there had been a single, unwilling mortgagee, that plan could not have been constitutionally imposed. (Citing Louisville Joint Stock Co. v. Radford, 295 U. S. 555.)"

In *Northern Pacific Co. v. Boyd,* 228 U. S. 482, holding that "no contracts involving the transfer of corporate property to a new corporation" can "defeat the claims of non-assenting creditors" even "though made under a consent decree."

V.

That the Court Erred in Depriving Appellants of the Interest Promised in the Bonds, Also Represented by Coupons Attached to the Bonds and an Integral Part of Those Bonds and for Which No Compensation or Consideration of Any Kind Has Been Allowed or Extended to Dissenting Bondholders.

We are unable to find any determination of this important principle of substantive law in the opinion of the Circuit Court. That no provision for the payment of interest due and unpaid on the bonds is made in the plan and that such interest will not be paid, is admitted in the briefs of all counsel and clearly shown in the record furnished by the transcript. This is not denied by debtor. The decisions cited and the quotations which are furnished show that petitioners are entitled to the interest due on the bonds—as much so as to the principal amount due on the bonds.

In the plan as amended, Debtor Corporation explicitly limits its offer of 250 shares of new capital stock to "the principal amount of the bonds outstanding." [R. 59.] That expression *excludes* the interest; this is admitted by Debtor and the entire record shows that Debtor Corporation does not intend to allow anything for the due and unpaid interest—now equal to the amount due as principal on the bonds. Petitioners have never received and have never waived that interest.

THE BANKRUPTCY ACT, SECTION 77B, subdivision (b) (10), is as follows:

> "In case of secured claims entitled to the provisions of clause (5) of this subdivision (b), the value of the security shall be determined in the manner provided in Section 57, clause (h) of this Act."

Section 57, clause (h), is as follows:

> "The value of securities held by secured creditors shall be determined by converting the same into money, *according to the terms of the agreement* pursuant to which such securities were delivered to such creditors."

"The terms of the agreement," in this case the bond itself, contains an express provision promising interest at 7½ per cent per annum—and without which (of course) nobody could have been induced to buy any of the bonds.

In *In re Day and Meyer* (93 Fed. (2d) 657) the Second Circuit Court of Appeals said:

> "The arrears of interest is also secured (to bondholders) and entitled to priority over the general creditors and preferred stockholders. *In their interest claims the bondholders should be protected.* They are not protected under the plan for they are given only common stock. Such common stock is given share for share to the old preferred stockholders who have no equity in the corporation and furnish no new consideration. Both the old preferred stockholders and the old common stockholders *should be subordinated entirely,* since the corporation, being insolvent, belongs to the creditors alone.
>
> "A reorganization plan providing that first mortgage bonds be reduced to one-half of their principal amount * * *, and eliminating the total amount of interest past due on the bonds, WAS UNFAIR and should not have been confirmed * * * since the plan did not preserve priorities and deprived bondholders of their lien." (Emphasis ours.)

Those two features, of reduction of amount of bonds to one-half and of elimination of the interest past due on the bonds, were the only issues involved in that case.

In *American Iron & Steel Co. v. Seaboard Airline*, 233 U. S. on page 266, the Supreme Court refers to "the general rule" of allowing interest to the time when the "property of an insolvent is *in custodia legis*" and then considers that the longer interest (to time of payment of the claim) would be due "if all claims were of equal dignity and all bore the same rate of interest from the date of the receivership to the date of final distribution." Then in that case the Supreme Court added:

> "But the rule did not prevent the running of interest during the receivership. (Citing) Johnson v. Norris, 190 Fed. 459, 460, where the Court held that creditors in bankruptcy were entitled to interest accruing after adjudication." (Page 267 of 233 U. S. Reports.)

In the case at bar the only unpaid creditors are the bondholders and their claims "all bear the same rate of interest and are of equal dignity." [R. 13.]

> "But the rule in equity receiverships is that upon interest bearing claims, having priority, interest continues to run until the actual payment of the claims."
>
> *In re Semon*, 11 Fed. Supp. 18.

> "Such is the case where there has been payment of interest on their bonds" and "creditor secured by a lien under a contract providing for interest, is entitled to interest on his claim to the date of payment even though inferior creditors may receive nothing."
>
> *Gerdes on Corporate Reorganizations*, Vol. 2, p. 974, citing
>
> *Southern Ry. v. Carnegie Steel*, 176 U. S. 257.

To this same effect is *Board of Commrs. v. Bernardin*, 74 Fed. (2d) 809.

VI.

That the Circuit Court Erred in Sustaining a Plan Which as to Dissenting Bondholders, Is Neither Fair, Equitable, Nor Feasible, and Is Discriminatory in That It Discriminates Unfairly in Favor of Unsecured Creditors and Present and Future Stockholders of Debtor and Against the Rights of Appellants as Dissenting Bondholders.

The opinion of the Appellate Court evidently considers the plan in this case, which deprives dissenting bondholders of their mortgage lien, denies them payment of any interest due and unpaid on their bonds, awards 23 per cent of the new capital stock to present stockholders of an insolvent corporation and would award to appellants one-eighth of the face value of their bonds in shares of capital stock of a new corporation, *to be fair and equitable.* This, we respectfully submit, is opposed to the substantive law involved in this case and as it has been established by the Supreme Court and by a number of the decisions of the United States Circuit Courts of Appeals.

In the opinion of the Appellate Court is the following:

> "Also, that the Government is planning the construction of warships and auxiliary vessels and that the shipyard of the subsidiary company is equipped for the building of vessels of the proposed type." [R. 377.]

This is opposed to the findings of the trial court. Adopted by the trial court, as shown on page 71 of the transcript, is the following:

> "If a shipbuilding construction programme is undertaken, it will require about $500,000. to place the four building ways in first class condition, or, if all

four are not rehabilitated at one time, about $150,000. for the first one and lessening graduated amounts for the other three, but not to exceed $500,000. in all. Only a small amount of money will be required to put the *rest* of the plant in first class order." [R. 71.]

On page 72 of the transcript is the following:

"The plant of the Los Angeles Shipbuilding & Dry Dock Corporation is not large enough to construct naval vessels but it could build auxiliary vessels. Much of our present merchant marine is obsolete and must be replaced in a few years." [R. 72.]

While the foregoing is designed to build up a remotely possible "equity" in the present stockholders, it shows one thing very clearly and that is that *new* money is required to rehabilitate the properties of debtor. NO NEW MONEY IS OFFERED. Debtor and its present stockholders are quite silent on that subject. Evidently debtor has some doubts of any necessity for new or additional money because it asserts in connection with the 170,000 shares as the unappropriated balance of its *new* stock (par value $1.00 per share):

"to be sold for cash for the purpose of providing new operating capital *in the event it is required by the Company.*" [R. 12.]

"The proposed plan set up in the debtor's original petition herein for reorganization does not provide for the furnishing of any *new* money by the old Class A shareholders." [R. 86.]

This plan discriminates against the appellants as dissenting bondholders. In its discrimination against dissenting bondholders, the District Court's confirmation of this plan runs *contra* to

Northern Pac. Ry. Co. v. Boyd, 228 U. S. 482;
First Nat'l Bank v. Florshem, 290 U. S. 504;
Gilfillan v. Union Canal Co., 109 U. S. 401;
Horn v. Ross Island, 88 Fed. (2d) 64;
In re Day & Meyer, 93 Fed. (2d) 657;
Texas Hotel Corp. v. Waco Dev. Co., 87 Fed. (2d) on page 400, and other cases quoted in preceding pages of this brief.

In *Northern Pacific Ry. Co. v. Boyd,* 228 U. S. 482, a railroad case at that and where the "public interest" was concerned, the Court decided:

"Contracts for reorganization made between bondholders and stockholders of corporations, insolvent or financially embarrassed, involving the transfer of corporate property to a new corporation, while proper and binding as between the parties, cannot, even when made in good faith, defeat the claims of non-assenting creditors; nor is there any difference whether the reorganization be made by contract or at a private sale, or consummated by a Master's Deed under a consent decree.

"Even in the absence of fraud, any device whether by private contract or under judicial sale whereby stockholders are preferred to creditors, is invalid. Citing 177 U. S. 683."

That such a plan is not fair and not equitable is shown by the decisions cited in previous pages of this brief.

For "feasibility"—the District Court has determined: 1. That present management—the old stockholders—are best equipped to carry on the shipbuilding business. In view of the fact that they have failed for the last ten years, present stockholders seem to have indicated their inability to succeed with present equipment. 2. That prospects for future business are good and that the stockholders might eventually profit in future years by allowing the old stockholders to continue the business through the medium of a new corporation. In order to do business in the future, these old stockholders must have their assets freed from the mortgage lien.

Even with such a delightful consummation, the "feasibility" is dependent upon the expenditure for necessary repairs and enlargements of "not to exceed $500,000." [R. 71.]

Present stockholders do not offer to expend any money or furnish "additional capital" for these necessary repairs. They do not offer to furnish "any new money." [R. 86.]

Feasibility cannot be based upon prospects of future profits however alluring they may seem to the Court or to a Special Master. This is shown by

Reading Hotel Corpn. v. Protective Comm., 89 Fed. (2d) 53;

Texas Hotel Corpn. v. Waco Developt. Co., 87 Fed. (2d) p. 400;

Wayne United Glass Co. v. Owens-Ills Co., 91 Fed. (2d) 827;

In re Vicksburg, 22 Fed. Supp. 490, decided April 18, 1938;

In Matter of Murrell, 29 Am. Bankr. Reports (N. S.) 290, and other cases.

In *Price v. Spokane Silver & Lead Co.*, 97 Fed. (2d) on page 245, that Court said (June 13th, 1938):

"(11) The court also erred in assuming that if, upon its face, the plan proposed appeared to be feasible, it was to be approved unless the objecting creditors could show that it was not feasible."

And also in that case but on page 247:

"(17) The *debtor* having failed to show that the proposed plan of reorganization was either fair, equitable or feasible, and also having failed to show that the stockholders of the debtor have any real interest in its assets or a right to participate in the plan of reorganization, we think the objecting creditors were entitled to a dismissal of the debtor's petition on the ground that it had not been filed in 'good faith.'"

VII:

That the Court Erred in Not Deciding the Doctrine of Estoppel of Debtor Which Is Specifically Pleaded and in Which Connection Appellants Rely Upon Section 5 of Article 2, Page 29 of the Trust Indenture and Which Appears Fully in the Transcript in This Case, Which Transcript Was Required by the Amended Praecipe and Which Were Consented to by All Counsel in This Case.

Squarely presented in the Transcript of Record and in the briefs is the question of estoppel. Appellants had hoped that the Appellate Court would pass upon that question. In its opinion, the court does not seem to have done so. That issue was specially pleaded in the written opposition to the petition for reorganization, was tried and passed upon by the trial court and is embodied in the transcript and the briefs.

By Way of Estoppel Herein.

The question presented in Case's Amendment to his Answer, by way of estoppel in this proceeding [R. 55, 56, 259, 261], comprehends the explicit obligations assumed by this Debtor to reassure and induce *the public* to buy its bonds and to protect its Trustee, as the same appear in the Trust Indenture, as SECTION 5 OF ARTICLE 2, on page 29 thereof, as follows:

> "SECTION 5. That they will not apply for nor avail themselves of injunction or stay proceedings, OR PLEAD or in any way take advantage of any valuation law, apportionment law, *appraisement* law, stay law, OR OF ANY OTHER LAW, whether now in force or

which may hereafter be enacted, which may in *any way,* ALTER, IMPAIR OR IMPEDE *the rights or remedies* of the holders of the bonds issued hereunder, or of the TRUSTEE as herein provided, or which shall effect or change the time, place, means or mode of perfecting or enforcing such rights or remedies; and THEY HEREBY EXPRESSLY WAIVE ALL BENEFIT AND ADVANTAGE OF ANY AND ALL SUCH LAWS.

"That they expressly waive the equity of redemption or right of repurchase, in case of any foreclosure sale hereunder, and agree that any and all such sales may be made free from any and all such rights." [R. 259.] (Italics ours.)

This section as to both of the makers of that Trust Deed—one of them the Debtor, was rather comprehensive—rather reassuring to the public and the prospective bondholders whom the Corporation hoped would be reassured thereby. To have these corporations, one the parent and the other the wholly owned subsidiary, expressly waive, in excellent legal phraseology, all of their rights to oppose, contest or even question the legal standing of the bonds, MUST have been calculated by this Debtor to persuade the public, which it intended to solicit, to buy its bonds.

"If debtor corporation thinks it may resort to *one* provision of its trust deed (relating to a ¾ths majority) that of section II, art. 9, page 79, it should also be bound by the earlier provision of that same trust deed, viz.: sec. 5, art. 2, page 29 in which it promises 'not to impair or impede the rights or remedies of holders of the bonds.'"

Section 5 on page 29 of the Trust Deed is a direct obligation not to question, contest or oppose the legal status of these bonds which the Debtor voluntarily assumed—to induce prospective bondholders to feel that they would be protected thereby.

Before the Chancellor, Debtor must seek equity with clean hands. It seems as if Debtor cannot, in good conscience, now gainsay its own assertions and avoid its own acts.

That section was an important representation made by Debtor to induce prospective bond buyers and firms of underwriters to purchase the bonds and to make them feel safe as against any later claims which Debtor might have made questioning the validity or due execution of the bonds. It constitutes an important *waiver* by the mortgagor of legal or equitable rights which it might later have asserted. The legal phraseology employed in that section is very comprehensive. It includes future contingencies such as "any other law, whether now in force or which may hereafter be enacted, which may *in any way* alter, impair or impede the rights *or remedies* of the holders of the bonds issued hereunder, or of the trustee as herein provided." Quite common, and deemed quite necessary, are such assurances in bond issues. They are an assurance of safety to the bondholders and also to the trustee. Without doubt those provisions were a substantial inducing cause to secure purchasers of the bonds.

This provision of the trust deed was intended to be, and was, both as to prospective purchasers and to the trustee, Debtor's positive assurance of the validity of these bonds, and that as to Debtor they were inviolate.

Authorities on the Doctrine of Estoppel.

This section 5, article 2, page 29 of the trust indenture seems to present an "estoppel in *pais*". Often commingled are the doctrines of "estoppel in *pais*", "equitable estoppel" or "*quasi* estoppel".

In a very recent case, that of *Robbins v. United States*, 21 Fed. Supp. 403, the issue of January 24th, 1938, it was held:

> "The doctrine of "equitable estoppel or *quasi* estoppel" has been extended to prevent a wrong being done whenever, in good conscience and honest dealing, a party ought not to be permitted to *repudiate* a previous statement, declaration or action."

Estoppel Against Mortgagor.

Conforming to the general rule a mortgagor is estopped to assert anything in derogation of the rights which the instrument purports to convey, as that he had no title at the time of executing the mortgage, that there is an outstanding title in a third person, that the estate mortgaged was other or less than an estate in fee simple, that the instrument was defectively executed. *Am. Water Works v. Farmers L. & T. Co.*, 73 Fed. (2d) 956.

Language of mortgage participation certificates, issued by assignee of mortgages, that assignor guaranteed that holders' interests in bonds and mortgages were not subordinate to other shares or prior interests, must be given effect as *promisor* reasonably knew holders would understand it, and certificates construed according to their terms, regardless of private arrangement between assignor and assignee; they being estopped to assert undisclosed understanding altering such terms to holders' detriment. *In re The Westover, Inc.*, 82 Fed. (2d) 177.

Where irrigation district alleged that bonds sued on were illegally issued, reply denying allegations and attaching copy of notice for special election at which bonds were voted, reciting that purpose was to issue bonds for things which answer alleged bonds were issued for, constituted good plea of estoppel *by recitals in bonds.* (C. L. Colo. 1983 *et seq.*) *Divide Creek Irr. Dist. v. Hollingsworth, 72* Fed. (2d) 859.

"Estoppel" is a means of repose, promotes fair dealing, and can not be made an instrument of wrong or oppression. Like the statute of limitations it is a conservator. *Daniels v. Tearney* (W. Va.), 102 U. S. 415; 206 N. W. 741, 744, 114 Neb. 134.

Doctrine of estoppel requires consistency of party's conduct when inconsistency would work substantial injury to other party to transaction. *Julian v. Nicholson, 72* Fed. (2d) 35.

> "The doctrine of equitable estoppel is founded upon equity and good conscience, and the party claiming the estoppel must have done something, *paid something* or in some way changed his position for the worse, so that he will not be left or cannot be put back in his former position in case the other party is allowed to assert his original rights."
>
> *Nell v. Dayton,* 45 N. W. 229, 43 Minn. 242.

> "An estoppel in *pais* is very well defined by Nelson, J. in Welland Canal Co. v. Hathaway, 8 Wend. 479, 483. He says: 'As a general rule a party will be concluded from denying his own acts or admissions which were expressly designed to influence the contract of another, and did so influence it, and when such denial will operate to the injury of the latter.'"
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> *Payne v. Burnham,* 62 N. Y. 69, 73;
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> *Piper v. Gilmore,* 49 Me. 149.

Argument on the Facts.

The facts of this case are as follows:

1. The petition of Debtor and orders of the District Court show that the primary purpose of this proceeding is to cancel and destroy the first mortgage liens of bondholders which are secured by the trust indenture [R. 12, 13, and on 16 (Sub. 6)] showing that the "holders of debtor's bonds are the only creditors and persons whose claims and interest will be affected by the Plan." All other creditors are to be paid in cash. [R. 16, 207.]

2. The bondholders would thereby be deprived of their substantive rights among which are: the right to foreclose their mortgage, have a judicial sale of the pledged assets under the direction of the Court, to bid at such sale on the properties pledged in the trust indenture, to have the rents and profits in the meantime and would lose their right to realize on a deficiency claim against the present very substantial stockholders. [R. 103, 135, 109.]

3. The bondholders would lose all interest due and unpaid on the bonds since Feb. 1st, 1929, and premiums promised in the bonds. [R. 59, 90.]

4. The Debtor is insolvent "both in the equity sense and in the bankruptcy sense." [R. 140.]

5. The present stockholders would receive under the proposed reorganization, 23 per cent of the capital stock of the new company and in addition, would receive a proportionate award to them of the new capital stock as owners of a very large percentage of the first mortgage bonds—although debtor is insolvent. [R. 58, 59, 88, 209.]

6. That the leasehold interest of Debtor at Los Angeles Harbor is valued by it at the sum of One (1)

Dollar; that it comprehends 68.54 acres of very choice water frontage and for this Debtor is paying $21,500 per year. On only a five per cent basis of yield, that leasehold interest is worth $430,000—of which sum 5 per cent is exactly $21,500. This lease runs to the year 1952, is subject to renewal which would undoubtedly be granted. [R. 70, 249, 250.]

7. That Thomas K. Case and Adele B. Cowan are secured creditors and dissenting bondholders; that they have never consented to any proceedings by Debtor in the past or present time and did not consent to the reorganization proceedings in 1930 under which Debtor became a "Limited" corporation. [R. 112, 113, 153.]

8. That Case's bonds, representing a par value of $13,500 and Cowan's bonds, representing a par value of $5,000, were all acquired by them prior to the year 1930, during which year and thereafter the supplements to the trust deed were created as Debtor's Exhibits F, G, H, and I. [R. 83, 110.]

9. That petitioners have never received any of the principal on their bonds and no interest since February 1st, 1929, have never joined in the release of the present stockholders of their liability on a deficiency claim, have received no shares of the capital stock of Debtor for any purpose and have not since received anything at any time. [R. 70, 247, 255.]

10. That petitioners, as dissenting creditors, claim by way of estoppel, that Debtor is estopped from indulging *as against them* in this proceeding for reorganization and all proceedings which would "in any way, alter, impair or impede the rights of the holders of the bonds issued hereunder," and rely for the purpose of said estoppel

upon Section 5, Article 2, page 29, of the trust indenture securing said bond issue. [R. 55, 56, 259-261.]

11. That Debtor claims that appellants, as secured creditors and dissenting bondholders, whose undeposited bonds represent a par value of $18,500, are dominated and controlled herein by more than 75 per cent of depositing bondholders the "consent" of which, to this proceeding, has been filed by the trustee named in the trust indenture, and in that connection Debtor relies upon Section II, Article 9, page 79, of the trust deed. [R. 261.]

12. The Debtor will acquire, free from the mortgage lien, all properties pledged in the trust deed, for the benefit of its stockholders and unsecured creditors. [R. 105, 154, 206.]

13. The only offer of Debtor is that of 250 shares of its new capital stock (par value $1 per share) for each $1,000 bond, "principal amount of the bonds," and makes no allowance for due and unpaid interest on the bonds. [R. 59, 90.]

This Plan Is Not Fair or Equitable

That the plan in this case is not fair or equitable seems to us quite evident from the determinations in the many cases cited in our preceding pages.

It destroys the first mortgage lien with the other substantive rights and gives present stockholders an equity to which they are not entitled. The plan makes no allowance whatever for accrued, due and unpaid interest on the bonds and is based "upon an unfair and inadequate appraisal" which does not involve or consider the very valuable Harbor Lease. Without that leasehold, Debtor could not have sold these bonds nor have secured authori-

zation to issue $3,500,000 in bonds or have transacted any of its business.

To Bethlehem Steel and other huge corporations now operating on the Pacific Coast, some of which are referred to in the Master's Report, for Dry Dock, Shipping, Manufacturing and other purposes, that exceedingly choice harbor frontage has an immense value.

The Plan takes no cognizance of that and yet it is the most valuable asset which debtor owns and hopes to again secure free from this mortgage lien. Debtor carries this valuable asset on its books at $1. [R. 139.]

In addition to the $830,203 in assets which Debtor concedes it owns, there should be an appraisement of the L. A. Harbor frontage lease of 68 acres for which Debtor is paying $21,500 per year. That payment shows that the leasehold interest is worth at least $500,000. It is widely known publicly and the records of the L. A. Harbor Board will show, that all of the valuable and of the choice water frontage there, has been leased and at the present time an appraisement should show that the leasehold interest is worth a million dollars and perhaps more—and that it is of increasing value. [R. 249, 250.]

Even a million dollars, although added to the $830,203, of the appraisement in this case, would not change Debtor's position here, as an insolvent corporation, it might make some very substantial difference in the value of the securities which are subject to appellants' liens. We are mindful of the dicision of the Ninth Circuit Court of Appeals in the concluding portion of the Court's decision in *Horn v. Ross Island*, 88 Fed. (2d) 64, concerning an "appraisal of the property securing such bonds."

Debtor's Unfair Offer.

For the appraised assets of $830,203. Debtor has created 1,000,000 shares of new capital stock, of which it offers:

(1) To BONDHOLDERS:

"641,375 shares of five per cent, non-cumulative, preferred stock (par value $1 per share) shall be issued in exchange for outstanding bonds ($2,565,-500) at the rate of 250 shares of said preferred stock for each $1,000 PRINCIPAL AMOUNT of bonds outstanding;"

(2) To PRESENT STOCKHOLDERS, known as "class A. shareholders":

"188,625 shares of common stock (par value $1) shall be issued to the Class A. shareholders. The shares of both classes of said stock shall have a par value of $1 per share. All shares having equal voting rights per share." [R. 209.]

These Class A shareholders are the present stockholders concerning whom the Special Master reports [R. 85] "are persons who have been in the past and who are now, active in the business operations of the Debtor and its subsidiaries."

The new company has one million shares. Of this 641,375 shares are preferred stock. The balance constitutes COMMON stock of 358,625 shares. Debtor's offer to present stockholders of 188,625 shares of common stock, still leaves undisposed of 170,000 shares of com-

mon stock. The Final Order of the District Court disposes of the common stock, actually 358,625 shares, as follows:

> "(b.) The said common stock of the new company shall be distributed on a pro-rate basis to the holders of Debtor's Class A. stock." [R. 345.]

"Class A. shareholders" could thus acquire more than *one-third* of all of the new capital stock—as present stockholders of Debtor. *In addition:* these same present stockholders would be awarded AS OWNERS OF OUTSTANDING BONDS, more than one-third of the outstanding bond issue. As appellants estimate it, they would acquire more than two-thirds of the entire capital stock of the new corporation.

> "Some of the old Class A. stockholders of the Debtor are bondholders." [R. 93.]

The dividends on the preferred stock are "non-cumulative."

Referring to this fact, the special master in his report states:

> "The modified plan does not provide for cumulative dividends for the reason that if the business is not prosperous, or is only moderately prosperous, such arrangement might be detrimental." [R. 96.]

Debtor's refusal of cumulative dividends shows how uncertain and unpromising it really regards future business prospects. The common stock carries the same 5% dividends as the preferred. All new stock will have "equal voting rights per share." [R. 209.]

Under This Unfair Plan, Much Money Is Needed to Enable New Company to Operate.

To continue in business with even the hope of future profits the new company must have much money. The Special Master estimates on page 71 of the record:

> "If a shipbuilding construction programme is undertaken, it will require about $500,000 to place the four building ways in first class condition or, if all four are not rehabilitated at one time, about $150,000 for the *first* one and lessening graduated amounts for the other three, but not to exceed $500,000 in all. Only a small amount of money will be required to put *the rest* of the plant in first class order." (The latter presumably in addition to the large sums.)

Likewise, on page 72 of the record:

> "The plant of the Los Angeles Shipbuilding & Dry Dock Corporation is not large enough to construct naval vessels but it could build the auxiliary vessels. Much of our present merchant marine is obsolete and must be replaced in a few years."

While the foregoing is purely conjectural, designed to build up a remotely possible "equity" in the stockholders, it shows *one* thing very clearly and that is that NEW MONEY is required to "rehabilitate" the properties of Debtor.

> "The proposed plan set up in the Debtor's original petition herein for reorganization does *not* provide for the furnishing of any *new* money by the old Class A. shareholders." [R. 86.]

There is no offer by the present stockholders to advance this necessary money, or any part of it. Without this new money in large amounts, Debtor will be in exactly

the same position if reorganized, *as it is in at present.* The evidence shows and the master's report indicates, that these are wealthy stockholders, yet they do not think enough of this corporation, or of its prospects, to even furnish "the compliance bonds" required on Government work.

These same dominating stockholders (also later bondholders) were willing to promise to pay 7½ per cent per annum, in 1924, as interest on these bonds to induce their sale, then sell the bonds for $3,210,000, then employ for several years as president, one George A. Armes with all the failures and the expenses incident therewith [R. 74, 76] and now they want the bond issue cancelled and to keep the pledged assets as their own. The 5 per cent dividends on the new preferred and common stock are a hazy vision. As "non-cumulative," there is not a binding promise unless profits are not all consumed by and under the same management and control. As of yore, since Feb. 1st, 1929, failure to *call* and pay for the bonds, failure to pay interest on them, failures to succeed in their business management, these same stockholders hope to have adopted their utterly unfair plan of reorganization. With multi-millionaire Daniel Murphy at their head, as "dominant factor in said Bank (the trustee), and in the Debtor corporation" and who "has been a large stockholder of Debtor ever since its incorporation and has acted as director thereof, personally and through his agent and employee, H. K. Bagley, and that said Daniel Murphy is now and for many years last past has been a director of Security-First National Bank of Los Angeles" [R. 109], he and this trustee Bank, insist that they shall again own the pledged assets which the decisions show now belong to the bondholders. The long default in the pay-

ment of interest or principal on the bonds, makes these bonds due and payable now, in the case of this insolvent corporation. There is no hope of inducing this trustee bank to act, as it has the right to do and as its duty requires it to act, under the provisions of the law and the trust indenture.

> "The said Daniel Murphy received a release from stockholders' liability and 21,670.50 shares of Class A. stock of debtor corporation" (out of a total of 57,000 shares). [R. 109.]

Showing that the rights of bondholders cannot be affected by prospective profits, or their right to foreclose be even delayed, the following cases are conclusive, that, as to them, prospects of profit are of no legal effect:

In *Security-First Nat'l Bank v. Rindge* (9th Circuit), 85 Fed. (2d) 557, Subdivision 5. of the decision:

> "Section 77 B. subd. (A), 11 U. S. C. A., section 207, gives the Court equity powers but it does not purport to alter long established incidents of property by introducing a vague and indefinable 'equity' into the proceedings."

The sole purpose of offering prospective or future profits, is to create an "equity" in the stockholders which, in the instance of an insolvent corporation, is not permitted.

> *Horn v. Ross Island* (9th Circuit), 88 Fed. (2d) 64;
>
> *Reading Hotel Case,* 89 Fed. (2d) 53; decided March, 1937, even though all of the mortgaged property was "transferred to bondholders," it was held that they did not have to wait for prospective profits but could proceed with their right to foreclose.

In re Day & Meyer, 2nd Circuit, New York, decided January 3rd, 1938, 93 Fed. (2d) 657, held:

> "A reorganization plan providing that first mortgage bonds be reduced to one-half of their principal amount, and that the equity thereby created by represented by issuance of new preferred and common stock (like case at bar) and eliminating the total amount of interest due on the bonds (also as in case at bar) was unfair and should not have been confirmed * * * since the Plan did not preserve priorities and deprived bondholders of their lien."

In *Wayne Un. Glass Co. v. Owens-Ills.,* 91 Fed. (2d) 827—Aug. 6, 1937:

> "Where stockholders and junior incumbrancers have no equity because of Debtor's insolvency, they cannot complain of dismissal of petition for reorganization."

Preble v. Wentworth, 84 Fed. (2d) 73;

Louisville J. S. Co. v. Radford, 295 U. S. 555, and other cases.

The prospects of future profit, as they viewed them, and their appreciation of the present management of Debtor, seem to have largely influenced the trial Court as well as the Special Master, to find the plan fair and feasible. [R. 85.] The final order repeats these views.

It is impossible to believe that depositing bondholders would *personally* "consent" to the cancellation of their first mortgage bonds for only *one-eighth* of the total amount of their claims in shares of stock in a reorganized corporation—with absolutely no cash and not even one-half of their first lien bonds preserved to them, with the priorities that accompany them.

No one can honestly place any cash value on those new shares of one dollar par value stock. There is no *market* value to those new shares. [R. pp. 247, 249-251, 256.]

This Debtor is in disrepute, widely known, is on the list for investigation by the Sabbath Congressional Investigation Committee and has received much unfavorable notoriety. [R. 247, 248.] Reorganized, it would become a dangerous "corporate cripple."

If the District Court is correct here, any private corporation could be authorized to cancel its large bonded debt, and issue to the bondholders nothing more than shares of stock in a new corporation. That would be to relegate first mortgage lien holders (the highest position), to the grossly inferior position of stockholders in a newly organized company—the lowest position—not even equal to that of a creditor who can sue upon his claim. The new company controlled always by the old stockholders could secure a new bonded debt—to bind its stockholders again and thereafter come into the bankruptcy court and have that bond issue cancelled and new stock issued therefor.

These wealthy stockholders conspired, in the year 1930:

(1) To freeze out, by assessment, all other stockholders, setting the example themselves by not paying the assessment. As the special master puts it "The principal features of this reorganization were as follows: the old stock of the corporation was wiped out by assessment." [R. 75.]

(2) Then these dominant stockholders effected in 1930, the reorganization of the company and newly created and issued to themselves all of the new "Class A. stock,"

with its voting rights and raised $400,000. "In consideration of this contribution, the bondholders released stockholders' liability as to such contributors." [R. 76, 258.]

At the same time, they created and issued 5,112 shares of new "Class B. stock," "to such of the bondholders who accepted the same in payment of bond interest coupons." [R. 76.] Later "The Class B. stock in escrow was cancelled and thus the Class A. stockholders who contributed the $400,000 *came into control of the company.*" [R. p. 77.]

Then in control of the reorganized company in 1930 and released from their stockholders liability by all *depositing* bondholders, these same Class A. shareholders gave the money they contributed to the Shipbuilding & Dry Dock company and through it, tried to make money for themselves in the shipbuilding business and in the company which they now own.

These same stockholders made the last payment of interest on the bonds on February 1, 1929. That was the time when business prosperity was at its peak. This was several months *before* the stock market crash began on October 28, 1929. Apparently they could not, during the best business years, make enough money to satisfy themselves, or pay the interest as it became due on the bonds.

These are the same stockholders, with Daniel Murphy, multi-millionaire, dominating them, who started the corporation many years ago, and obtained $3,210,000.00 from the sale of the bonds in 1924, continued in business during subsequent years, and in 1930 effected their reorganization. By withholding interest on the bonds, these were,

of course, greatly depreciated in value. Then these present stockholders bought back, "as low as $65 per $1000 bond" [R. p. 254], the bonds for which they had received par. Always in control of the company and having on deposit from thoroughly discouraged bondholders, more than 75% of the total issue, they created a supplement to the trust deed in 1930, and sought to postpone foreclosure of the bonds until the year 1944. With that kind of experience behind them—a long record of failure to keep their obligations, these same substantial stockholders are deemed by the District Court to be alone worthy and competent to continue the business gamble at a time too, not as in those prosperous years of the past up to 1930, but NOW, at a time when there is a real depression existing. The Special Master and the District Court quite clearly indicate that they think the prospects are good of securing government contracts to build larger ships than the company is now equipped to handle. These same stockholders show that they have not enough confidence in business prospects for the future, to even promise to pay into the company any part of the "less than $500,000." which is now required to construct new "building ways," provide "for the removal of the dry-dock" and make the other necessary repairs which are described *in extenso* in the report of the special master and as adopted [R. p. 135] by the Court. [R. pp. 72, 73, 75, 76.]

These same wealthy stockholders who have handled the millions from the bond issue, indicate no desire to even personally provide the bonds which the Government always requires before it accepts bids for its work. Probably the only concern of these same stockholders is to acquire, free from the bonded lien, the valuable assets as their own, which the Plan would give to them.

Rather illuminating is it that no *creditors* other than the bondholders are "effected by said plan of reorganization." [R. pp. 16, 146.]

Present stockholders would greatly profit by the Plan, receive new stock in this insolvent corporation and own all assets free from the bonded lien.

Notwithstanding the past record of failure, the District Court gives as its reasons for awarding capital stock in the new corporation to present stockholders of an insolvent corporation, the following:

> "(22) The bonds of debtor are owned by approximately 757 individuals who are widely scattered and unorganized. It will be beneficial to the bondholders to allow the Class A shareholders to participate in this reorganization so as to provide continuity of management. [R. 321.]
>
> "(23) that it will be an asset of value to the New Company and its shareholders to retain Debtor's present Class A shareholders as shareholders of the New Company because of their familiarity with the operation of the business of Debtor and its subsidiary Shipbuilding Company, and because of their financial standing and influence in the community." [R. 321.]

These are the reasons of the District Court for confirming the plan and denying to bondholders their substantive rights.

We submit that even in cases where the first mortgage liens of bondholders are preserved and their right to fore-

close merely postponed, that the several decisions cited in this brief show that the District Court cannot consider possible future profits of a new corporation, a reason for denying to them, the rights of bondholders and forever taking their pledged property away from them.

We are of the belief that sound—and final—is the reasoning employed in the *Radford* case (Supreme Court), the *Horn* case, the *Tenn, Pub. Co.* case, the *Security-First Nat'l v. Rindge* case, where the Supreme Court on January 4th, 1937, denied certiorari,—all pronouncing the doctrine that

> "The right to retain a lien until the debt secured thereby is paid is a substantive property right which may not be taken from the creditor consistently with the Fifth and Fourteenth Amendments to the Constitution."

The claim of dissenting bondholders has been throughout, and is, that the Order Confirming the Plan violates their constitutional rights, and also violates the provisions of section 77B of the Bankruptcy Act in that this Plan is unfair and inequitable, and does not afford the "Adequate Protection" required by that section.

Under the law, petitioners seriously doubt whether any prospect of future profit, could furnish a basis for a District Court's judgment depriving dissenting bondholders of their lien and other substantive rights.

All of this reasoning of the learned trial Court could be made to apply, *as a matter of conjecture,* to *any* corpora-

tion which, like this Debtor, wanted to get rid of its bonded debt—and start anew. All corporations could plausibly argue:

1. That the old stockholders who have operated the business of a corporation, would be better fitted to continue the business than the bondholders who have had no such experience;

2. That because old stockholders in control of the corporation are wealthy, they might possibly be willing to advance money to carry on the new business concern;

3. That probably the chances of future profit are better with a new company which did not have to pay any of the interest due on a bonded debt, and especially so if, having cancelled the old bonded debt, they could raise additional or "new" money with the creation of a new bonded debt.

The Supreme Court of the United States contemplated something of this kind, in *Bank v. Florshem,* 290 U. S. 504, 79 L. Ed. 465, 474 & 475, when it decided:

> "By these means it was hoped to subject all dissenting creditors to the condition of impotency so frequently occupied by minority stockholders. * * * The purpose of the transaction was to hinder and delay certain creditors. * * *
>
> "The power of the District Court was invoked, not to enforce rights of creditors, but to defeat them. The fact that the means employed to effect the fraudulent conveyance was the judgment of a Court and not a voluntary transfer, does not remove the taint of illegality."

Conclusion.

Petitioners believe that the "Transcript of Record," furnished by the Circuit Court of Appeals to this Court, with the statement of evidence contained therein, shows the reasons why the District Court confirmed this plan. Until the Circuit Court of Appeals rendered its opinion deciding that its transcript was "partial and incomplete" and that "the appeal must be considered as one taken on the judgment roll alone," the transcript of record as furnished to the Circuit Court of Appeals, was complete and without criticism. The briefs of all counsel considered only the questions of law involved in this case. To have printed a *complete* transcript of the evidence with the many lengthy exhibits therein, would have supplied, unnecessarily, a tremendous record and would have cost several thousands of dollars. Appellants did not need such a transcript to present the questions of law and they, as well as Debtor corporation, did not want it.

There is not a word in that transcript to which Debtor consented in the Amended Praecipe requiring it. This was the exact transcript which the trial Court by its written order required to be printed, and there is nothing therein which can be considered, even remotely, as an attack upon the findings of fact found by the District Court. That Court's conclusions of law upon those facts furnish the basis for the claim of appellants that all of those facts together do not justify confirmation of this manifestly unfair plan.

Perhaps the opinion of the Circuit Court of Appeals that the appeal must be considered as one taken on the judgment roll alone, is the reason for its avoidance of the questions of substantive law presented by the Tran-

script of Record now before this Court and which were exhaustively presented and considered in the briefs of all counsel.

In a recent Supreme Court case, that of *In re 620 Church Street Building Corporation*, 299 U. S. 24, 27, 57 S. Ct. 88, 89, 81 L. Ed. 16, appears the following:

1. A judgment of the Circuit Court of Appeals declining jurisdiction of an appeal from an order of the District Court confirming a plan of reorganization under Section 77B of the Bankruptcy Act, held reviewable by *certiorari* under Section 262 of the Judicial Code, P. 26;

2. Section 262 Judicial Code permits the employment of the writ of *certiorari* in cases not covered by Section 240 and affords ample authority for using the writ as an auxiliary process and as a means of giving full force and effect to existing appellate authority and of furtherance of justice in other kindred ways.

The Circuit Court of Appeals in its opening statement asserts:

> "the record contains a statement of evidence and proceedings on the hearing of the proposed plan but *concededly* it is partial and incomplete."

APPELLANTS HAVE NEVER CONCEDED, OR THOUGHT, THAT IT WAS "INCOMPLETE." For all of the purposes of the appeal appellants considered, and petitioners do now consider, that the Transcript of Record is complete and that the record in this case and now before this Court, discloses the questions of law which furnish the basis for the appeal.

Just what the Circuit Court of Appeals meant by the use of the word "partial," is not clear to us. True it is

only a part of the evidence and it is "partial" to the conviction of petitioners that Section 77B does not contemplate or permit a consummation such as this, for any embarrassed corporation, or ever or at any time, under the circumstances of this case.

This "partial" statement of the evidence was the one *settled* by the District Court without objection from, and was settled with the consent of, counsel for Debtor Corporation. This was done as required by the Amended Praecipe in that Court. [R. 288, 289.] The District Court's order, in that respect, was made on July 6th, 1938, as shown by the Transcript of Record. [R. 263.]

The judgment roll alone, shows the character of this proceeding, the plan of reorganization, the findings of fact and the *conclusions of law* based upon those findings of fact and upon *them* arise the questions of law which seem to have been ignored by the Circuit Court of Appeals.

The appeal is based upon several important questions of substantive law shown by the record consisting of the judgment roll, the Transcript of Record before this Court containing the opinions and judgment of the District Court, a partial statement of the evidence, and the briefs of all counsel which were devoted exclusively to those questions of law which concern substantive rights.

The "stipulation" not to attack the findings of fact has been adhered to. The portion of the evidence stated in the transcript may not be necessary to this appeal on questions of law alone.

A certified copy of the order of the District Court requiring that this particular transcript containing part of the evidence, be printed as the transcript in the case, could

have been obtained and filed among the record of the Circuit Court of Appeals had any such question arisen.

This stipulation, signed by all counsel, narrates the *same six points* presented upon this appeal. [R. pp. 285-287.] There is nothing whatever in the stipulation not to question findings of fact, which requires any abandonment of any part of the record of the evidence *furnished in the transcript.* This transcript was specified in and required by the amended praecipe, as it appears in the Transcript of Record on pages 288, 289, which praecipe was adopted by all counsel and is not questioned in the briefs on appeal. It is a partial record of the evidence on both sides of the case and supports the substantive law relied upon in this case. Under our 6th specification of assigned errors relied upon, likewise the 6th "Point" *specified in this stipulation,* that "This plan is neither fair, equitable nor feasible and is discriminatory," petitioners have the right to comment on the record printed in the transcript. That is the order on file, made by the District Court, which directed the clerk to print that transcript as required by that amended praecipe, Appellants had the right and the duty to rely on the evidence printed by consent, in the transcript and to rely on the records in this case there printed.

To petitioners it seems repugnant to established legal principles to contemplate the cancellation of a first mortgage lien for an only consideration of 250 shares of $1.00 par value stock in a new corporation, for "each $1,000 bond, principal of the bond only," and where

nothing is allowed for the due and unpaid interest on the bonds, where 23 per cent of the new capital stock will be received by present stockholders of an admittedly insolvent corporation and where such present stockholders who are very large owners of deposited bonds (bought at 6½ cents on the dollar) will undoubtedly control the new corporation.

If the announced law of this case, up to the present time, is correct, *no* value hereafter can be placed on first mortgage bonds which, when a corporation refuses to pay them or to permit foreclosure, can be cancelled under 77B of the Bankruptcy Act, for a consideration in capital stock of a new corporation, estimated at only *one-eighth of the "face value of those bonds."*

The ultimate decision of this Court of last resort is of the utmost importance to the many corporations now in process of reorganization in the lower Federal Courts and to corporations which will attempt in the future to achieve the same result.

This solitary and unheard of example of corporate reorganization, as a victory which utterly destroys the bondholder, is being followed by members of the legal profession, the accounting professions, by the investment bankers and by the numerous bank trustees always named in bond issues. An enlightened philosophy concerning Section 77B should be the guiding influence in corporate reorganizations, for corporations in financial distress. That section was never intended as an instrument for the

perpetration of unfairness to secured creditors, or to any creditors.

Admittedly proposed for the solitary purpose of getting rid of the bonds, this plan of reorganization seems unconscionable. The present judgment in this case *as a precedent* for future corporate reorganization, will do immeasurable harm. Such a precedent, as a victory in high finance, if allowed to stand, will transmute a mortgage lien into shares of cheap capital stock. Such action will drive thousands of men and women of ordinary means—the usual type of purchasers of private corporation bonds—to want and starvation. A large number of corporations who desire to get rid of their bonds will seek, under this decision of the Circuit Court of Appeals, to perpetrate a similar fraud on their bondholders. A bond bought from a private corporation at 100 cents on the dollar, will no longer be a secured lien but a small number of shares of capital stock of a corporate cripple having very little, and probably no, value. When this new corporation is relieved of control by the Bankruptcy Court, there is nothing to prevent it from creating a new bond issue. Present stockholders bought at 6½ cents on the dollar [R. p. 254] *much* more than the "$676,500." owned by the "Security Company, wholly owned affiliate of the Trustee named in the trust indenture." [R. 84.] The foregoing and the fraudulent reorganization effected in 1930 when "all of the stock was wiped out by assessment," are revealed in the "partial" transcript of the evidence printed in this case.

The petition for Stay of Mandate and the Petition for Rehearing were denied by the Circuit Court of Appeals on February 9th, 1939.

It is respectfully submitted therefore that a Writ of Certiorari should be granted in this matter.

Dated: March 23rd, 1939, Los Angeles, California.

THOMAS K. CASE,
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